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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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AMERICAN STEAMSHIP OWNERS MUTUAL	:	
PROTECTION AND INDEMNITY	:	Case No.: 04 Civ. 04309 (LAK)
ASSOCIATION, INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
ALCOA STEAMSHIP CO., INC. and the Other	:	
Entities Listed on Exhibit A to the Second	:	
Amended Complaint,	:	
	:	
Defendants.	:	
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**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT AS TO  
DEFENDANT HENDRY CORPORATION**

**PRELIMINARY STATEMENT**

Defendant HENDRY CORPORATION ("HENDRY") moves to dismiss this action as to it on the basis of a prior written settlement and mutual release covering the subject matter of this action. This Memorandum of Law is submitted in support of that motion.

### **BACKGROUND**

The American Steamship Owners Mutual Protection and Indemnity Association, Inc. (“CLUB”) is a mutual indemnity insurance association. HENDRY was a member of the CLUB for the insurance years 1986/87, 1987/88 and 1988/89.

Prior to each insurance year, HENDRY and the other members were required to pay a premium. In addition to this premium, other “assessments” could be levied against members if the CLUB paid out more money in claims than it received in premiums for a given insurance year. In 1991, the CLUB sued HENDRY in a lawsuit styled American Steamship Owners Mutual Protection and Indemnity Association, Inc. a foreign corporation v. Hendry Corporation, a Florida corporation, Case No. 91-3955, in the Circuit Court for Hillsborough County, Florida. The CLUB alleged HENDRY failed to pay certain premiums and assessments during the three years HENDRY was a member of the CLUB. HENDRY answered the Complaint and counterclaimed for a cancellation and/or rescission of the insurance policies.

After several years of litigation, the controversy was settled on July 31, 1995. The Settlement Agreement specifically stated: “[t]he litigation arises from premiums and similar assessments claimed by the Club as a result of Hendry’s purchase of protection and indemnity insurance from the Club for the insurance years 1986/87, 1987/88 and 1988/89.” HENDRY and the CLUB settled all claims for consideration described within the Settlement Agreement. Following the Settlement Agreement, the CLUB voluntarily dismissed the action without prejudice on October 26, 1995. After the terms of the Settlement Agreement had been complied with, the CLUB and HENDRY signed a Mutual Release on April 24, 1996. In the Mutual Release, the CLUB agreed to release and forever discharge HENDRY “from all manner of actions, including but not limited to, breach of contract, known or unknown, loss and damage whatsoever, controversies, judgments, claims, costs, expenses and demands whatsoever, in law,

in equity, in admiralty or otherwise, any and all claims which were or could be raised in the lawsuit American Steamship Owners Mutual Protection and Indemnity Association, Inc. a foreign corporation v. Hendry Corporation, a Florida corporation, Case No. 91-3955, based upon American's claim for premiums and similar assessments as a result of Hendry's purchase of protection and indemnity insurance from American for the insurance years 1986/87, 1987/88 and 1988/89." HENDRY agreed to provide monetary consideration and also release the CLUB from all claims which were or could be raised in the same lawsuit.

The present action is a declaratory judgment action, initiated by the CLUB, relating to the CLUB's procedures for handling asbestos-related incurred, but not reported, claims (hereinafter referred to as "IB&R"). Specifically, the CLUB seeks to end a discretionary practice of using general reserves for IB&R claims from closed insurance years prior to February 20, 1989, to reopen closed insurance years and levy assessments, and finally to assess asbestos claims against the insurance years implicated by the claims. In short, the present action relates to additional CLUB assessments for IB&R claims which would require HENDRY to pay assessments in complete and total disregard of their mutual release.

### **ARGUMENT**

Even though res judicata and collateral estoppel are usually raised as an affirmative defense, a Rule 12(b)(6) motion to dismiss is appropriate when the defense appears on the face of the complaint. See *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 74 (2d Cir. 1998). Here, the CLUB's Amended Complaint, makes clear the CLUB is attempting to recover assessments that are barred by the res judicata and/or collateral estoppel effect of the settlement agreement and mutual release.

Res judicata precludes the re-litigation of "issues actually decided in determining the claim asserted in the first action and of issues that could have been raised in the adjudication of

that claim.” National Labor Relations Board v. United Technologies Corp., 706 F.2d 1254, 1259 (2nd Cir. 1983). Collateral estoppel is not as broad as res judicata; it precludes the re-litigation of an issue of fact or law, but does not preclude a claim. *Id.* at 1260. In addition to court ordered judgments, settlement agreement have preclusive effect according to the terms of the agreement. See Greenburg v. Board of Governors of the Federal Reserve System, 968 F.2d 164, 168 (2nd Cir. 1992); Norfolk Southern Corporation v. Chevron, U.S.A., Inc., 371 F.3d 1285 (11th Cir. 2004). When parties agree to a dismissal pursuant to a settlement agreement, the principles of res judicata and/or collateral estoppel apply to the matters within the settlement agreement, rather than the complaint. Norfolk Southern, 371 F.3d at 1288. In determining the preclusive effect of a settlement agreement, traditional principles of contract interpretation apply. *Id.* at 1289.

The doctrine of res judicata bars the present action between the CLUB and HENDRY by reason of the Settlement Agreement and Mutual Release between the two parties which precludes any and all premium and assessment claims arising out of the insurance years 1987 through 1989. Both the prior suit and this suit were brought by the CLUB. The prior suit named HENDRY as the only defendant, while the present action named all CLUB members between 1940 and 1989. This distinction is immaterial since the defendant was a member of the CLUB and the dispute involved the payment of premiums and assessments which would foreseeably benefit all members, past and future. Because the present action includes the CLUB and all members that may be the beneficiary of an assessment, or be forced to pay such assessments, the parties are for all practical purposes the same.

For res judicata to apply, the scope of the settlement agreement and mutual release must be consulted to determine its preclusive effect. The Settlement Agreement between HENDRY and the CLUB states, “the litigation arises from premiums and similar assessments claimed by

the CLUB as a result of HENDRY's purchase of P&I insurance." In the Settlement Agreement, the parties agreed to release all claims for valid consideration. In addition, the Settlement Agreement stated that, upon the conditions of the agreement being met, each party would execute a release. Following the meeting of the conditions in the Settlement Agreement, a Mutual Release was signed by the parties on April 24, 1996.

In the Mutual Release, the CLUB agreed to "release and forever discharge Hendry" from "all manner of actions, including but not limited to, breach of contract, known or unknown, loss and damage whatsoever, controversies, judgments, claims, costs, expenses and demands whatsoever, in law, in equity, in admiralty or otherwise, any and all claims which were or could be raised [in the previous lawsuit], based upon [the CLUB's] claim for premiums and similar assessments as a result of HENDRY's purchase of protection and indemnity insurance from [the CLUB] for the insurance years 1986/87, 1987/88 and 1988/89." Consideration was given in the release, and the release was signed by both parties. It is clear that both the previous litigation and the current litigation involve CLUB assessments arising from the insurance years 1986-1989 which would implicate HENDRY. Accordingly, since both the previous and current litigation involve assessments, and the CLUB agreed to release HENDRY from any future assessments, the CLUB's claims against HENDRY should be dismissed upon the grounds of res judicata.

In the event res judicata is deemed not to apply, the doctrine of collateral estoppel should preclude any and all issues raised by the CLUB with respect to the payment of assessments arising from HENDRY's brief relationship with the CLUB. Since the settlement agreement and mutual release prohibit any claims and/or demands to be made concerning assessments against HENDRY, collateral estoppel bars the litigation of any issue of fact or law related to any additional assessments against HENDRY. Because the present action only implicates HENDRY

if future assessments are made against them, HENDRY should be dismissed from this action because of the preclusive effect of the settlement agreement and mutual release.

WHEREFORE, HENDRY prays that its Motion to Dismiss Complaint as to Defendant Hendry Corporation be granted.

Dated: Tampa, Florida  
June 13, 2006.

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